UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

IIG WIRELESS, INC. f/k/a UNLIMITED PCS, INC.; and UPCS CA RESOURCES, INC.

and **Case 21-CA-152170**

JOANNA ROSALES, an individual

BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Before the Honorable Jeffrey D. Wedekind, Administrative Law Judge

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Respondents UPCS CA Resources, Inc. ("UPCS") and IIG Wireless, Inc. f/k/a Unlimited PCS, Inc. ("IIG") ("Respondents"), through counsel and pursuant to the National Labor Relations Board's (the "Board") Rules 102.46 et. seq., file the following brief in support of their Exceptions to the decision of Administrative Law Judge ("ALJ") Jeffrey D. Wedekind, dated April 14, 2016. Respondents take eleven exceptions to the ALJ's decision. The legal arguments for the exceptions are set forth below.

I. INTRODUCTION

The United States Supreme Court, numerous Circuit Courts of Appeals and the California Supreme Court have consistently found that arbitration agreements that prohibit class actions are both enforceable and consistent with the principles of the Federal Arbitration Act ("FAA"). *See Am. Express v. Italian Colors Rest.,* 133 S. Ct. 2304 (2013); *CompuCredit Corp v. Greenwood,* 132 S. Ct. 665 (2012); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011); *Circuity City Stores, Inc. v. Adams*, 532 US 105 (2001); *Murphy Oil v.* NLRB 808 F.3d 1013, *en banc petition for hearing pending* (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB,* 737, F.3d 344, 359 (5th Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Johnmohammadi v. Bloomingdale's, Inc.* 755 F.3d 1072, 1077 (9th Cir. 2014); *Sutherland v. Ernst & Young LLP,* 726 F.3d 1050, 1055 (2nd Cir. 2013); *Walthour v. Chipio Windshield Repoair, LLC,* 745 F.3d 1326, 1340 (11th Cir. 2014); *Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal.4th 348, 367-74 (2014).

Supreme Court precedent is clear that the FAA and not the National Labor Relations Act ("the NLRA") governs the validity of a pre-dispute arbitration agreement between an

employer and employee. *See generally Marmet Health Care Ctr. Inc. v. Brown* 132 S.Ct. 1201 (2012).

Noteworthy about the ALJ's decision in this matter (hereinafter, "*ALJD*") is the absence of any precedent from a court of law finding that enforcement of an arbitration agreement that results in a class action waiver is unenforceable under the NLRA. No federal appellate court has enforced the Board's finding that the NLRA supersedes the FAA and can render unenforceable an arbitration agreement which, as here, does not include a class action waiver. Nearly every federal court of appeals to consider the Board's position on this issue, whether directly or indirectly, has rejected the Board's argument.

The federal circuit courts' repeated rejection of the Board's conclusions, and the manner in which its decisions have been received, is highlighted by the Fifth Circuit's observation that, "it is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law, or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders." *Murphy Oil USA, Inc. v. NLRB,* 808 F. 3d at 1013, 1021. The ALJ's decision is yet another part of a self-fulfilling cycle, where Administrative Law Judges cite to one another's cases, and the Board's affirmation, while repeatedly disregarding how reviewing courts have treated their decisions.

Respondents except to the Board's decision for a number of reasons, including the Board's unwavering reliance on *D.R. Horton v.* 357 NLRB No. 184 (2012) and *Murphy Oil USA, Inc.* 361 NLRB NO. 72 (2014). Even under *D.R. Horton,* Respondents cannot be found to have violated the NLRA as they have not acted to restrict concerted activity. In fact, Rosales is

currently pursuing representative PAGA claims in state court in addition to her individual non-NLRA claims in arbitration before JAMS, unencumbered by Respondents.

II. STATEMENT OF FACTS

A. Parties

Respondent IIG Wireless, a California corporation with its principal office and facility located in Garden Grove, California, is engaged in the business of the retail sale of wireless and telecommunications products. *Joint Stipulation of Facts and Motion To Submit Case On Stipulation ("Jt. Stip.") Facts* ¶ *5(a)*. Respondent UPCS, a California corporation with its principal office and facility located in Irvine, California, is engaged in the business of providing staffing for wireless communications retail facilities. *Jt. Stip. Facts* ¶ *6(a)*. Since about April 2013, UPCS provided staffing for wireless communications retail facilities operated by IIG Wireless at its California facilities.

Charging Party worked as a retail salesperson for IIG Wireless starting in or about August 2012. *Jt. Stip. Facts* ¶ *10*. For purposes of this proceeding only, and without admission by Respondents to joint employer status in any other proceeding, Respondents terminated Rosales from her employment in or about January 2014. *Id.*

B. Rosales signed a Mutual Arbitration Agreement

On or about August 8, 2012, in relation to her employment, Rosales signed and agreed to be bound by an arbitration agreement (the "Agreement"). *Jt. Stip. Facts* ¶ *11*. The Agreement provides, in part, that as a condition of employment, employees must agree to use the arbitration forum for employment-related disputes and other disputes as described in the Agreement. *Id.*; *Jt. Stip. Facts* ¶ *35(a)*. There are absolutely no facts, stipulated or otherwise, that Rosales would have not been hired had she not signed the Agreement. In addition, there are absolutely no facts, stipulated or otherwise, that Respondents ever refused to hire any prospective employee for not signing the Agreement. The Agreement reads, in relevant part, as follows:

ARBITRATION

Binding arbitration of disputes, rather than litigation in courts, provides an effective means for resolving issues arising in or from employment situations. Arbitration is generally fasters, cheaper and less formal for all parties. Unlimited PCS, Inc., is committed to using binding arbitration to resolve all legal disputes, whether initiated by Unlimited PCS, Inc. or by an employee, in a forum which provides this alternative to the court system. As a condition of employment, employees must also agree to use the arbitration forum. Unlimited PCS, Inc.'s agreement to use binding arbitration is confirmed by this statement; your agreement is confirmed by your signature below or by your acceptance or continuation of employment upon notice of this policy. This policy, unlike other employment terms, is not subject to unilateral modification or rescission by Unlimited PCS, Inc.; it may not be modified or rescinded except by a mutual, written and signed further agreement by both Unlimited PCS, Inc. and by you.

MUTUAL ARBITRATION AGREEMENT

"Unlimited PCS, Inc. (the "Company") and I mutually agree that any dispute or controversy between us arising from or in any way related to my employment with the Company, shall be submitted to and determined by binding arbitration under the California Arbitration Act (Cal. Code Civ. Proc. § 1280 *et seq.*). . . .

This agreement governs all disputes between the Company and me, including without limitation disputes related to my seeking employment with the Company, the terms or conditions of employment, the termination of my employment, and breaches of any duty owed by me to the Company. This agreement governs all disputes whether based on tort, contract, statute, common law or otherwise, including but not limited to claims for misappropriation of trade secrets, breach of any duty of loyalty, contractual obligation or fiduciary duty, harassment and discrimination. This agreement, however, does not govern disputes regarding entitlement to Worker's Compensation or Unemployment Insurance benefits.... "

Jt. Ex. 6. The Agreement does not expressly provide a class action waiver, but rather requires all employment related disputes to be arbitrated. *Jt. Ex. 6.* Moreover, there is nothing in the Agreement preventing an employee from filing a claim with the NLRB or pursuing their non-NLRA claims in arbitration.

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C. The Lawsuit

1. *Original Demand for Arbitration*

On or about October 2, 2014, Rosales filed a demand for class action arbitration against Respondents for alleged wage and hour violations under the California *Labor Code*. *Jt. Stip. Facts ¶ 13* (the "Demand"). On November 4, 2014, in a letter sent by facsimile and United States Mail, Respondents objected to the Demand, informing Rosales and JAMS, respectively, that the Agreement limited parties to the pursuit of "individual arbitration." *Jt. Exs. 8 and 9.* Specifically, Respondents pointed out that Rosales' Demand was invalid as it sought a class or collective arbitration, which the Agreement had not expressly authorized. In other words, the Agreement did "not include the requisite express authorization for class arbitration" and therefore class action was not an available avenue to Rosales. *Jt. Exs. 8 and 9.*

2. *Superior Court Lawsuit Filed*

On or about November 17, 2014, Rosales filed a judicial action in the Superior Court of California, County of Orange against Respondents with a sole cause of action under the California *Labor Code's* Private Attorneys General Act of 2004 (hereinafter, "PAGA"), Case No. 30-2014-00756943-CU-OE-CXC. *Jt. Stip. Facts ¶ 16.* The basis for the PAGA Action was alleged wage and hour violations under the California *Labor Code* (the "Lawsuit"). *Jt. Stip. Facts ¶ 16.* Rosales then filed an amended complaint on or about November 19, 2014 to amend certain language and confirm that the Lawsuit was only a representative action under PAGA and not in pursuit of a class action. *Jt. Stip. Facts ¶ 17, Jt. Ex. 11.* Rather, Rosales sought class action relief solely in arbitration. *Jt. Stip. Facts ¶ 13, Jt. Ex. 7.*

3. *Respondents' Cross-Complaint for Declaratory and Injunctive Relief*

In response to Rosales' Demand, on or about January 14, 2015, Respondents filed a cross-complaint for declaratory and injunctive relief in the Superior Court of California, County of Orange. ("Decl. Relief Cross-Complaint"). The Decl. Relief Cross-Complaint does not seek to challenge, or in any way restrict, the PAGA Action pending before the court. Rather, Respondents' Decl. Relief Cross-Complaint seeks: (1) a declaration that the Agreement prohibits class arbitration

of the disputes subject to the Agreement; (2) an order enjoining Rosales from proceeding with class or collective arbitration against Respondents; (3) a declaration that the Agreement reserves for the Superior Court jurisdiction over all questions concerning whether the Agreement prevents class or collective arbitration of the disputes subject to the Agreement; and (4) an order enjoining Rosales from seeking any determination or seeking to enforce any determination from the arbitrator that the Agreement provides the opportunity for class or collective resolution of any dispute subject to the Agreement. *Jt. Stip. Facts* ¶ *20.*

On or about June 16, 2015, in reliance of the arbitration agreement, Rosales filed a petition to remove Respondents' Decl. Relief Cross-Complaint from the Superior Court and compel it to arbitration. *Jt. Stip. Facts* ¶ *22.* Rosales' petition specifically sought: (1) an order referring the question of arbitrability of class claims to the arbitrator to decide; (2) in the event the Superior Court decided to make a determination whether class arbitration is permissible under the terms of the Agreement, an order compelling arbitration of the class claims challenged in the cross-complaint; and (3) an order staying the cross-complaint pending arbitration. *Jt. Stip. Facts* ¶ *22.*

In response to Rosales' petition, on or about June 23, 2015, Respondents filed a motion for judgment on pleadings to obtain, among other things, an immediate declaration from the court that under the FAA, the Agreement does not expressly permit class treatment in arbitration pursuant to the Decl. Relief Cross-Complaint. *Jt. Stip. Facts* ¶ *23.*

On or about July 14, 2015, the Superior Court issued a minute order denying Rosales' petition to compel arbitration of the Decl. Relief Cross-Complaint. *Jt. Stip. Facts* ¶ *28.* The Court's order, in pertinent part, found: (1) the court, not the arbitrator must make gateway decisions, such as whether the arbitration agreement provides for class actions in the absence of clear and unmistakable express indication to the contrary; (2) that the subject arbitration agreement is silent on the availability of class arbitration, thus requiring Rosales to arbitrate her individual claims only. *Jt. Ex. 20.* Subsequent to this Order, it is undisputed that Rosales pursued her individual *Labor Code* claims before JAMS and had the opportunity to arbitrate those non-NLRA claims before the arbitrator, Hon. Candace Cooper (ret.).

Rosales filed a notice of appeal of the order denying her petition on or about July 16, 2015. *Jt. Stip. Facts* ¶ *29*. That appeal is currently pending, and the Superior Court stayed Respondents' motion for judgment on the pleadings pending the outcome of that appeal. *Jt. Stip. Facts* ¶ 32).

D. More Than Six Months After Rosales Received Notice Of Respondents' Objection To The Demand For Class Arbitration, Rosales Filed The Unfair Labor Practice Charge Underlying This Complaint.

On May 13, 2015, six months and nine days after Respondents notified Rosales that they objected to the Demand "on the basis that it s[ought] a collective arbitration where none [was] authorized by the underlying arbitration agreement", Rosales initiated this case with an unfair labor practice charge. *Jt. Exs. 2 and 9.* Rosales alleged that Respondents' "[p]rohibition of class and representative actions is an unfair labor practice pursuant to NLRA sections 7 and 8(a)(1)." *Jt. Ex. 2.* Some three months later, on August 28, 2015, Rosales filed her first amended charge against Respondents, adding an allegation that Respondents "as joint employers, have interfered with, restrained, and coerced its employees . . . by . . . seeking to prohibit class and representative actions in all forums, arbitral or judicial." *Jt. Ex. 3.*

On November 12, 2015, the General Counsel issued a Complaint and Notice of Hearing. *Jt. Ex. 4.* The General Counsel alleged *inter alia* that since about January 14, 2014, Respondents enforced the provisions of the Agreement by requiring Rosales as a condition of her employment to sign and be bound by the Agreement and by pursuing a cross-complaint for declaratory and injunctive relief against Rosales seeking (1) a declaration that the Agreement prohibits class arbitration of disputes subject to the Agreement, [and] (2) an order enjoining the Rosales from proceeding with collective arbitration against Respondents." (*Id.* at ¶¶7(a) & (c)). Through such conduct, the General Counsel alleged, "Respondents have been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act." *Id.* at ¶10.

Respondents timely answered the Complaint. *Jt. Ex. 5.* In their answer, as an affirmative defense, Respondents noted that the "allegations are time-barred by Section 10(b) of the NLRA. *Id.* at First Affirmative Defense. [1]

III. THE ALJ'S CONTINUED APPLICATION OF THE BOARD'S HOLDINGS IN *D.R. HORTON, INC.* 357 NLRB NO. 184 (2012) AND *MURPHY OIL USA, INC.* 361 NLRB NO. 72 (2014) IS IMPROPER (EXCEPTIONS 1, 2, 3, 4, 5, AND 9).

The ALJ's decision concludes that an employer's maintenance of the subject arbitration provision violates Section 7 and 8(a)(1) of the NLRA pursuant to *D.R. Horton* and *Murphy Oil. ALJD, at p.3:40-45.* Specifically, that the subject provision (1) would reasonably be construed to prohibit employees from filing unfair labor charges and (2) was applied by Respondents to prevent Rosales from pursuing her wage and hour and other state claw claims against them on a class or representative basis either in arbitration or in court. These findings disregard both the FAA and case law holding that the instant arbitration agreement is enforceable.

The FAA provides, in relevant part, that a pre-dispute arbitration agreement is enforceable save upon such ground as exist at law or in equity for the revocation of such contract. 9 U.S.C. §2. The FAA is part of a general liberal federal policy favoring arbitration agreements. *See generally, Marmet Health Care Ctr. Inc. v. Brown* 132 S.Ct. 1201 (2012*); See also, CompuCredit Corp., supra,* at 669.

Case law also runs contrary to the ALJ's finding that there exists a violation of the NLRA. More than twenty-five federal district courts, the Second Circuit Court of Appeals, the Fifth Circuit Court of Appeals, the Eighth Circuit Court of Appeals, the Ninth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals have all provided negative treatment of

[1]Respondents also asserted (1) that Complainant failed to provide Respondents fair and adequate notice of the charges under the U.S. Constitution, Section 10 of the NLRA, and the Board's Rules and Regulations; (2) failed to state a claim upon which relief can be granted; (3) that the Complaint is invalid to the extent General Counsel pleaded legal conclusions rather than factual allegations; and (4) that the Complaint is invalid to the extent it contains allegations not timely-filed within the pending unfair labor practice charge against Respondents.

the Board's decisions in *D.R. Horton* and *Murphy Oil*. *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 292 (2nd Cir., 2013); *D.R. Horton, Inc. v. NLRB* 737 F.3d 344, 355, 36 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, *petition for en banc hearing pending* (5th Cir. 2015); *Owen v. Bristol Care, Inc.* 702 F.3d 1050 (8th Cir., 2013); *Richards v. Ernst & Young,* LLP 734 F.3d 871, 873-874 (9th Cir. 2013); *Davis v. Nordstrom*, 755 F.3d 1089 (9th Cir., 2013); *Johnmohammadi v. Bloomingdale's Inc.*, 755 F.3d 1072 (9th Cir. 2013); *Walthour v. Chipio Windshield Repair, LLC* 745 F.3d 1326 (11th Cir. 2014).

It is not simply district and circuit courts that have enforced class action waivers in arbitration agreements. The United States Supreme Court, deferring to the FAA, has found unlawful any law prohibiting the use of class action waivers in consumer arbitration agreements. *AT&T Mobility L.L.C. v. Concepcion,* 563 U.S. 321 (2011). The California Supreme Court, the highest state court in the state which Rosales worked, has also enforced class action waivers in employment arbitration agreements and struck down the Board's arguments in *D.R. Horton. Iskanian v. CLS Transportation Los Angeles,* 59 Cal.4th 348 (2014). ("We thus conclude ...that sections 7 and 8 of the NLRA do not represent a 'contrary congressional command' overriding the FAA's mandate.") (citations omitted). The instant arbitration agreement does not even contain a specific class action waiver, but rather is silent on the issue. The agreement here is, therefore, even less restrictive - both by its terms and as applied – than those which contain an express class action waiver.

The universal disdain given by civil courts to the Board's rulings in *D.R.* Horton and its progeny, has matriculated into administrative law judges' decisions. Notably, at least one administrative law judge recognized that the FAA prevails on the issue of enforceability of a class action waiver as the Board's decision in *D.R.* Horton has "no oxygen" when all appellate court decisions are taken into account. *In re Haynes Building Services, LLP*, (Case No. 31-CA-0939020, JD(ATL)-03-13, at *13-14, February 7, 2014). Of note, the Board concedes that the *D.R. Horton* rule has met a "skeptical reception" in appellate courts. *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (2015).

The ALJ's usage of the *U-Haul* standards in the analysis of whether a violation of the NLRA has occurred, is distinguishable. *See ALJD, at p. 4:9-14. U-Haul Co. of California,* 347 NLRB 375, 377-378 (2006). For example, in *U-Haul*, the Board found an arbitration policy unlawful because it prohibited causes of action brought under the NLRA. Such is not the issue here as there is no prohibition on the filing of administrative actions before the Board. Therefore, the agreement signed by Rosales does not fall under any of the *Lutheran Heritage* categories of: 1) being construed by employees to prohibit Section 7 rights by employees; 2) being promulgated in response to union action; or 3) being used to restrict the exercise of Section 7 rights by employees. *Lutheran Heritage Village v. Livonia,* 343 NLRB 646 (2004). There is nothing in the record to support a factual finding on any of these three factors as required under *Lutheran Heritage*.

Many of the courts, in addition to numerous administrative law judges, have made findings contrary to the one made by the ALJ on the issue of whether a mandatory arbitration agreement violates the NLRA despite the FAA. The ALJ's decision is neither supported by statute nor case law and should be reversed.

IV. RESPONDENTS EXCEPT TO THE ALJ'S IMPROPER RELIANCE ON A FEDERAL DISTRICT COURT RULING THAT IS CURRENTLY ON APPEAL (EXCEPTION 3)

The ALJ's decision purports to rely on the Federal district court decision of *Totten v. Kellogg Brown & Root, LLC,* --- F.Supp.3d --- 2016 WL 316019, 2016 U.S. Dist. LEXIS 10424 (C.D Cal. Jan 22, 2016) (Dolly M. Gee, J.). The facts of the *Totten* case are not only distinguishable from the case at hand, but on February 22, 2016, an appeal of that Order was filed before the US Court of Appeals for the Ninth Circuit. Since *Totten* is on appeal, it is not precedential authority. *Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 34. In terms of facts, the *Totten* District Court found that the arbitration agreement's express class action waiver was invalid under federal labor law as reasoned by the NLRB in D.R. Horton. Unlike the employer in *Totten,* there is no express class action waiver. On the contrary, the Arbitration

Agreement is silent as to class resolution and therefore United States Supreme Court precedent in the case of *Stolt-Nielsen N.A v. AnimalFeeds Inter. Corp.* (2010) 130 S. Ct. 1758, 1775-1778 must apply [holding that imposing class arbitration on parties "whose arbitration clauses are 'silent' on that issue" is "fundamentally at war" with the FAA.]Respondents further have not sought to enforce the arbitration agreement against the collective PAGA action filed by Rosales in state court.

V. UNDER *D.R HORTON & MURPHY OIL,* THERE IS NO BAR TO CONCERTED ACTIVITY IF AN ARBITRATION AGREEMENT SIMPLY REQUIRES ARBITRATION OF INDIVIDUAL EMPLOYMENT-RELATED CLAIMS AND DOES NOT PRECLUDE A JUDICIAL FORUM FOR COLLECTIVE EMPLOYMENT ACTIONS BY ITS TERMS AND AS APPLIED (EXCEPTIONS 4-5)

The ALJ's reasoning under *D.R. Horton,* that the subject arbitration agreement bars concerted activity is incorrect both legally and factually. [*ALJD, p. 3:43-44*] Under *D.R. Horton,* an agreement does not bar concerted activity when, by its terms and as applied,(1) it does not preclude a judicial forum for class or collective action; and (2) it permits the employee to pursue non-NLRA claims in arbitration individually. *Id.*

In *D.R. Horton*, the Board found a violation because "all" forums were precluded by the agreement. *D.R. Horton* made this statement twice.

> **"[W]e only hold that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral *and* judicial."**

See D.R. Horton, p. 2288, section II.

> **"We thus hold for the reasons explained above, that the Respondent violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in *all* forums, arbitral *and* judicial**

See D.R. Horton, p. 2289, section III.

As the arbitration agreement in *D.R. Horton* required employees to waive their right to collectively pursue employment claims in ***all*** forums, arbitral ***and*** judicial, it was deemed to

violate the NLRA. See *D.R. Horton, p. 2289, section III.* Indeed, *D.R. Horton* clarified that it did not rely on an "***or***" standard by stating it would not find a restriction on concerted activity for **"an agreement requiring arbitration of any individual employment-related claims, but not precluding a judicial forum for class or collective claims."** *D.R. Horton, p. 2288, section III. D.R Horton* therefore unequivocally stands for the proposition that there is no violation unless ***all*** forums, ***arbitral and judicial***, are foreclosed by the agreement. Similarly in *Murphy Oil*, the Board affirmatively concluded that the agreement violated the NLRA where it "expressly bars employees from exercising their Section 7 rights to pursue collective litigation of employment related claims in ***all*** forums" (emphasis added). *Id.*

Here, the ALJ erroneously found a violation due to an "implied waiver" theory with no supporting authority and which improperly imposed a more restrictive standard than espoused in either *D.R. Horton* or *Murphy Oil.*

Again, Respondents' arbitration agreement does not – both by its terms and as applied – preclude judicial class or collective claims. In fact, Rosales filed a collective employment PAGA action in state Superior Court to which Respondents have made no objection. That matter is currently pending and being litigated concurrently with Rosales' individual arbitration employment claims.

As held by *D.R. Horton*, an employer does not violate the NLRA by requiring individual arbitration of non-NLRA employment claims when there is no evidence that the agreement, by its terms or as applied, precludes a judicial forum for collective claims. Because the subject agreement does not and has not been used to preclude Rosales from pursuing her collective PAGA claims in a judicial forum, Respondents could not have violated the NLRA pursuant to *D.R. Horton.* To find otherwise would in effect result in a "large-scale [and] sweeping invalidation of arbitration agreements" – something that *D.R. Horton* expressly

stated it would not do. *D.R. Horton, p. 2289, section III.*[3] Accordingly, Respondents except to the ALJ's attempt to misapply *D.R. Horton* and *Murphy Oil* to the present set of facts.

VI. RESPONDENTS EXCEPT TO CONCLUSIONS OF LAW ONE THROUGH THREE AS ERRONEOUS, CONTRARY TO THE FAA AND ESTABLISHED PRECEDENT, AND RESPONDENT'S CONSTITUTIONAL RIGHTS

A. Conclusion 1 is Without Merit Because Respondent's Arbitration Agreement Cannot be Construed to Prohibit Administrative Charges (Exceptions 5, 6)

The ALJ's first conclusion finds a violation because employees could reasonably believe that the agreement "bars or restricts them from filing unfair labor practice charges with the Board." *ALJD,* p. 5:34-36. The ALJ failed to properly consider the *Lutheran Heritage* test which applies to the review of arbitration agreements. *See PJ Cheese, Inc.* 326 NLRB No. 177, *12 (2015) (citing to *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). The threshold issue under *Lutheran Heritage* is whether the rule "expressly" restricts Section 7 activity. *Id.* Nothing in the subject agreement "expressly" states that an employee may not file a Board charge. If there is no express restriction on Section 7, *Lutheran Heritage* requires a finding of one of the following: (1) that employees would reasonably construe the agreement to prohibit Section 7 activity; (2) that the agreement was promulgated in response to union action; or (3) that the agreement has been used to restrict the exercise of Section 7 rights.

There is nothing in the record to support a factual finding on any of these three categories exist under *Lutheran Heritage*. As to category (1), the ALJ failed to appropriately consider that the language of the arbitration agreement applied solely to the civil litigation

[3] The ALJ's conclusion that UPCS applied the agreement to restrict concerted activity simply because they maintained an arbitration agreement that is "silent" on class actions is erroneous and inconsistent with United States Supreme Court precedent and *D.R. Horton.* Since there is not yet a judicial class action complaint, finding a violation on this basis is premature. If it is a violation, then any employer with an arbitration agreement silent as to class/collective actions, will be subject to a ULP Charge even though there has been no enforcement the agreement in state court. Further, a violation cannot solely be based on an objection to class arbitration. Under *D.R. Horton*, an employer is permitted to insist on individual arbitration. Unless there is some showing that Respondents restricted concerted activity in a judicial forum there is no violation of the NLRA here. Respondents contend that merely maintaining an agreement that is lawful under United States Supreme Court precedent and the FAA cannot be a violation of the NLRA.

process and not the NLRB process. The agreement is clearly not directed at the NLRB process as it states that "arbitration is generally faster, cheaper, and less formal for all parties." Further, the agreement, by its terms, only applies to disputes between the employee and the company, not those disputes between the public and the company. See *Amalgamated Utility Workers v. Consolidated Edison Co.* 309 U.S. 261 (1940). A Board Charge is not a dispute between the employee and the company – it is a dispute between the General Counsel 'on behalf of the public,' and the employer. Thus, to conclude that an employee may construe the agreement to prohibit Board charges is speculative at best. Regardless, United States Supreme Court and Board precedent confirms that arbitration agreements may lawfully encompass NLRA claims. The Supreme Court has broadly held that parties may lawfully agree to arbitrate Board claims. 14 *Penn Plaza LLC v. Pyett,* 556 U.S. 247, 258. Further, the Board has held for decades that NLRA claims may lawfully be resolved in arbitration and may be made subject to mandatory arbitration agreements. *Babcock & Wilcox Construction Co.,* 361 NLRB No. 132, slip. Op at 5 and 33 (2014). If the Board defers to arbitration awards in part because parties have explicitly agreed to have statutory claims resolved in arbitration, the Board cannot also find that entering into such agreements violate the NLRA.

As to category (2), there is nothing in the record to indicate that the agreement was promulgated in response to union activity. Finally, as to category (3), there is no evidence that Respondents "applied" the arbitration agreement to restrict Section 7 activity. As outlined above, Respondents did not impede Rosales' rights to pursue her collective PAGA claims in a judicial forum in addition to her individual claims. At most, Respondents sought to avoid class arbitration and require individual arbitration of non-NLRA claims. However, pursuing legal avenues to ensure that class arbitration is not thrust upon an employer is not unlawful and does not preclude an employee from pursuing other forms of collective claims.

Under *D.R. Horton*, insisting that arbitral proceedings be conducted individually is not sufficient to qualify as a restriction on concerted activity. See *D.R. Horton, at p. 2288, Section II. C.* **["...[N]othing in our holding here requires the Respondent or any other employer**

to permit, participate in, or be bound by a class-wide or collective arbitration proceeding...Employers remain free to insist that arbitral proceedings be conducted on an individual basis."] As recognized by the United States Supreme Court and the California Supreme Court, the shift from individual bilateral arbitration to class arbitration "**fundamentally changes** the nature of the arbitration proceeding and significantly expands its scope." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 686 (*Stolt-Nielsen); AT&T Mobility L.L.C. v. Concepcion,* 563 U.S. 333 (2011). Therefore, "it cannot be presumed the parties consented to [classwide arbitration] by simply agreeing to submit their disputes to an arbitrator." *Id.* Here, Respondents are simply interpreting the agreement as requiring individual arbitration of disputes as permitted under *D.R. Horton* and Federal and California law.

Moreover, Respondents have not precluded Rosales from pursuing her collective state court action as the California Supreme Court has held that PAGA Actions are not subject to pre-dispute arbitration agreements *Iskanian v. CLS Transportation Los Angeles,* 59 Cal.4th 348 (2014). *Stolt-Nielsen*, 559 U.S. at p. 685.

The ALJ provides no support for the proposition that a mere objection to a class arbitration demand is, in fact, a restriction on concerted activity. As outlined above, *D.R. Horton* held otherwise.

B. Conclusion 2 is Erroneous Because the Instant Facts Are Distinguishable from *D.R. Horton* and *Murphy Oil* (Exceptions 1–5, 8)

The ALJ's second conclusion is that Respondents' maintenance of the instant arbitration agreement compels employees, as a condition of employment, to waive the right to maintain class or collective actions in ***any*** forum. *ALJD, p.5:37-40.* The ALJ relies on the *D.R Horton* and *Murphy Oil* line of cases which have been rejected by the overwhelming majority of courts, including federal circuit and California courts. To the extent the ALJ relied on these cases, as outlined in detail above, the ALJ's conclusion is flawed since *D.R. Horton* held that an arbitration agreement must prohibit class or collective action in ***all*** forums, arbitral ***and*** judicial, before there can be a finding that the agreement prohibits concerted activity. As discussed at length above,

Rosales has not been prohibited from pursuing her collective PAGA action. Respondents merely objected to her pursuit of class arbitration in light of the Supreme Court's holding in *Stolt-Nielsen.* Further, to the extent that the ALJ found that execution of the agreement was, in fact, enforced as a condition of employment, there has been no finding or stipulation that Rosales would not have been hired had she not signed the agreement.

C. Conclusion 3 is Factually Incorrect Because Respondents Have Not Sought To Enforce the Arbitration Agreement Against Rosales In Her State Court Action (Exception 4, 5)

The ALJ's third conclusion is that Respondents violated the NLRA by "seeking to enforce the ... arbitration agreement against Rosales in her state court action." *ALJD, p. 5:42-43.* This finding is factually incorrect and, in any event, violates Respondents right to insist upon individual arbitration, as well as its First Amendment Rights to pursue meritorious legal action under the FAA. In any event, Respondents did not use the subject arbitration agreement to prevent or bar Rosales' state court PAGA Action. Respondents only sought to prevent class **arbitration** by seeking declaratory and injunctive relief. *ALJD, p.3:7-12.* There has been no ruling on Respondents action. To be sure, Rosales' state court PAGA Action is still pending and is currently proceeding in state court. Rosales never pursued a class action in state court and thus Respondents never sought to compel arbitration in reliance on the agreement. Ironically, it was Charging Party Rosales who sought to enforce the arbitration agreement when she filed a Petition to Compel Arbitration on June 16, 2015. *ALJD, p.3:21-26.* Rosales' Petition was denied.[4] See *Jt. Ex. 20.*

Even if the Board finds that there was some attempt to enforce the arbitration agreement against a "state court action" (which there was not), the ALJ provides no authority whatsoever for the proposition that the NLRA permits the Board to dictate how Respondents litigate non-NLRA

[4] The court denied Rosales' Petition finding that (1) the Court decides questions of arbitrability and (2) Rosales may not arbitrate her claims on a class basis pursuant to *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.,* 559 U.S. 662, 684-685 (2010).

claims. Accordingly, the ALJ's conclusion that Respondents violated the NLRA by seeking to enforce their rights before the appropriate court is erroneous.

VII. RESPONDENTS EXCEPT TO THE ALJ'S CONCLUSION THAT ROSALES' CHARGE IS TIMELY DESPITE A MERITORIOUS STATUTE OF LIMITATIONS DEFENSE (EXCEPTION 7)

Respondents except to the ALJ's decision on the grounds that Rosales failed to bring her charge within the six-month period required by Section 10(b). Despite knowledge that she could pursue her Charge before the Board as of November 4, 2014, Rosales failed to do so. In fact, she waited more than six months after an objection had been lodged by Respondents providing clear and unequivocal notice of a possible violation of the Act before filing her Charge on May 13, 2015.

The ALJ should have found Rosales' Charge untimely. The ALJ erroneously relies on *Cowabunga* for the proposition that continuing to maintain a purportedly "unlawful" provision [precluding concerted activity] permits Rosales to maintain this action though untimely. As stated above, the agreement is not unlawful because it does not – on its face or as applied- preclude concerted activity. Further, as outlined above, the agreement cannot reasonably be construed to limit any right to pursue claims before the NLRB.

Second, the ALJ presumes that Respondents sought to enforce the alleged unlawful provision in "Rosales' state court action." *ALJD, p. 5, ln. 9-10.* This is not accurate. Respondents only utilized the arbitration agreement to ensure that they were not required to **arbitrate** Rosales' claims on a class basis when there was no agreement to do so. As outlined herein, this is not the same as precluding other forms of collective actions in a judicial forum, which is evidenced by Rosales' pending PAGA Action. Therefore all the cases cited by the ALJ, including *Cowabunga,* are inapplicable.

As such, the ALJ improperly found the charge to be timely even though Rosales failed to comply with Section 10(b). Respondents therefore request that the Board make a ruling that Rosales' Charge be dismissed.

VIII. THERE IS NO EVIDENCE THAT THE ARBITRATION AGREEMENT EXECUTED BY CHARGING PARTY WAS NOT VOLUNTARY (EXCEPTION 8).

Rosales was neither coerced nor forced to sign the subject arbitration agreement. Based on the parties' joint stipulation that was submitted, there is no evidence that the agreement was not signed voluntarily. Nor is there any evidence in the record to show that any other employee was refused employment for failing to sign the arbitration agreement. Respondents request a finding that the Board failed to present sufficient evidence that Rosales signed the agreement involuntarily. The following supports Respondents' position on this matter:

1. There is no evidence that Rosales was required to sign the arbitration immediately, or even the day of, her being provided the arbitration agreement.
2. The Board did not confirm that Rosales involuntarily signed the arbitration agreement.
3. The Board did not provide any other evidence, or obtain a stipulation, that Respondents required Rosales to sign the agreement.
4. There is no stipulation that the agreement was actually enforced as a condition of employment.
5. There is no evidence that any employees were disciplined, terminated or adversely affected for refusing the sign the agreement.

The issue of whether Respondents enforced the agreement as a condition of employment was, and is, expressly denied. The ALJ cannot make presumptions of what occurred without any evidence to cite to. This finding must be overturned.

IX. RESPONDENTS EXCEPT TO THE REMEDIES AND ORDER ISSUED BY THE ALJ TO THE EXTENT THAT THEY CONTRAVENE PREVIOUSLY ISSUED COURT ORDERS, VIOLATE RESPONDENTS' FIRST AMENDMENT RIGHTS, AND/OR DISREGARD THE FAA (EXCEPTION 9)

The ALJ's remedies and order include a number of obligations upon Respondents which violate the FAA including rescission of the mutual arbitration agreement. As an initial matter, the Order is factually problematic in that it presumes that Rosales has a class state court action pending that is being challenged by Respondents. Rosales does not have a class claim in state court and Respondents do not oppose Rosales' representative PAGA Action.

The ALJ's Order requires Respondents to "notify the state superior and appeals courts in *Rosales v. UPCS CA Resources, Inc. et al.,* Superior Court Case No. 30-2014-00756943-CU-OE-CXC and Court of Appeal, Fourth Appellate District, Division 3 Case No. G052269 ... that Respondents no longer oppose Rosales' class or representative claims on the basis that they are barred by the agreement." This remedy intrudes on the state court's jurisdiction over the non-NLRA claims and Respondents First Amendment Rights. Questions regarding litigation of non-NLRA claims are exclusively within the province of courts who have jurisdiction over such claims, not the NLRB. The ALJ is essentially dictating decisions regarding arbitration of non-NLRA claims for which they have no jurisdiction.

The ALJ's order precludes Respondent's from objecting to Rosales' class action arbitration demand, or filing a Cross-Complaint to ensure individual arbitration only. This violates Respondents' rights under the First Amendment "to petition the Government for a redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 741 (1983); See *BE & K Construction v. NLRB* 536 U.S. 516 (2002). The Board does not have the right to dictate what pleadings and litigation strategy a Respondent can pursue or what motions a Respondent can file in a pending civil lawsuit. It is for the courts to decide whether such pleadings or motions have merit. Respondents are specifically permitted and authorized under the law to preclude class arbitration under the FAA and Supreme Court precedent as outline above.

The ALJ's order also requires Respondents to reimburse reasonable attorneys' fees and litigation expenses for asserting their right not to be forced into class arbitration. This is a miscarriage of justice and a violation of Respondent's due process rights. Finally, the ALJ's order requiring rescission of the arbitration agreement contravenes the FAA and cannot be enforced by this proceeding.

X. RESPONDENTS EXCEPT TO THE ALJ'S FAILURE TO ADDRESS THE CLAIM THAT THE BOARD VIOLATED THE ADMINISTRATIVE PROCEDURES ACT (EXCEPTION 10)

The NLRB's General Counsel Memorandum GC 10-06 plainly held that class action waivers in employment agreements are not *per se* violative of the NLRA. After *D.R. Horton*, the NLRB revoked this memorandum with no prior notice to the public. This revocation was unlawful and in violation of the Administrative Procedures Act. The ALJ failed to consider and/or address this memorandum in his decision.

XI. CONCLUSION

This case is not just the traditional *D.R. Horton* case. There is no class action waiver in the Respondents' agreement and the subject arbitration agreement has not been "applied" to restrict concerted activity in state court. Instead, when Rosales filed a class action arbitration demand, Respondents relied upon well-established judicial precedent and the FAA to prevent class arbitration. Respondents, did not, however interfere with Rosales' filing of a collective PAGA action. The subject agreement (by its terms and as "applied") therefore does not amount to a violation of the NLRA.

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For these and the other reasons outlined above, Respondents request that the Board grant its exceptions to the ALJ's findings and reverse the ruling accordingly.

Respectfully submitted,

Dated: May 12, 2016

Respondents

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

IIG WIRELESS, INC. f/k/a UNLIMITED PCS, INC.; and UPCS CA RESOURCES, INC.

and **Case 21-CA-152170**

JOANNA ROSALES, an individual

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2016, I e-filed the foregoing **BRIEF FOR RESPONDENTS UPCS CA RESOURCES, INC. AND IIG WIRELESS, INC.** using the Board's e-filing system, and immediately thereafter served it by electronic mail upon the following:

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Dated this 12th day of May, 2016, at Irvine, California.

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